



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII



IN THE MATTER OF)

Roy C. Bobo)

Docket No. TSCA-07-2001-0022

Respondent)
_____))

DECISION ON MOTION FOR DEFAULT ORDER

Background

A complaint was filed in this proceeding on March 19, 2001 and copies of the complaint and other relevant documents were sent to the mailing address for Respondent Roy C. Bobo, an “individual person” according to the complaint, on that same date, by certified mail, return receipt requested. The complaint alleged one violation of the Environmental Protection Agency’s lead “Disclosure Rule” (40 C.F.R. Part 745, subpart F), promulgated pursuant to the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851, *et seq.*, and proposed a penalty of \$11,000 for the alleged violation. Based on the return receipt for the complaint, the record indicates that the complaint was received by a Mary Bobo at Respondent’s mailing address. The record does not otherwise identify Mary Bobo or her relationship to Respondent.

Respondent Roy Bobo did not file an answer to the complaint, and has not otherwise appeared in the proceeding. Complainant filed a motion for default order on May 16, 2001, after making an attempt to elicit Respondent’s participation in the proceeding by sending a letter

advising Respondent of the potential consequences of failure to file an answer.¹ Although counsel for Complainant was generally thorough in the pleadings, upon review of the then-current record I issued an order on September 25, 2001 directing Complainant to supplement the record addressing whether Respondent was properly served with the complaint in accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.5(b)(1)(i). Complainant filed its supplement on October 10, 2001.

Upon review of the entire record, including the supplemental filing by Complainant, and for the reasons stated below, I find that the record does not support a finding that the complaint in this proceeding was served on Respondent in accordance with 40 C.F.R. § 22.5(b)(1)(i). Therefore, the motion for default order is denied.

Applicable Procedural Rules

Resolution of this motion is governed by Rule 22.5(b)(1)(i) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.5(b)(1)(i). The rule provides, in relevant part, that, with respect to an individual, a complaint may be served by certified mail, return receipt requested, “on Respondent, or a representative authorized to receive service on respondent’s behalf... .” Although the term “representative” may be broadly construed to

¹The letter was sent to Respondent’s mailing address in the same manner as the complaint. However, in this instance, while not directly relevant to the issue decided here, as a factual matter the signature on the return receipt is illegible, and the record does not otherwise indicate who received the document. Similarly the record includes signatures for receipt of my September 25 Order and Complainant’s supplemental motion, but the identity of the recipient is unclear on each.

include a person “who regularly receives and signs for certified mail” on behalf of a respondent,² there must be some showing that the person receiving the complaint has some representative relationship to the respondent.

Discussion

In its supplemental memorandum in support of the motion for default order, Complainant raises three arguments in support of its contention that service of the complaint in this proceeding has been perfected in accordance with Rule 22.5(b)(1)(i). First, Complainant argues that the United States Postal Service (USPS) guidelines allow delivery of certified mail “to a competent member of the addressee’s family, or to any other person authorized to represent the addressee,” and Rule 22.5(b)(1)(i) also allows service in such manner. Second, Complainant notes that Rule 4(e)(2) of the Federal Rules of Civil Procedure authorizes service of a complaint upon an individual “by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein,” and that Rule 22.5(b)(1)(i) similarly allows such service. Third, Complainant notes that In re Herman Roberts, 2000 EPA RJO LEXIS 211 (RJO, April 14, 2000) (citing Katzen Bros., *supra*) found proper service where an individual other than respondent received a complaint directed to respondent at respondent’s post office box.

Without analyzing the relevance of the cited guidelines and rules to Rule 22.5(b)(1)(i), it is sufficient to note that Complainant only addresses whether service can be perfected where a

²See, Katzen Bros., Inc. v. United States Environmental Protection Agency, 839 F.2d 1396, 1399 (10th Cir. 1988).

complaint is received by a person other than a respondent. Clearly, Rule 22.5(b)(1)(i) allows service on a respondent or an authorized representative of a respondent. The problem here, however, is that the record indicates nothing of Mary Bobo's relationship to Respondent. We know only that: (1) Ms. Bobo has the same last name as Respondent; and (2) she was present at Respondent's mailing address when the complaint was delivered and she signed the return receipt. The record does not show whether Ms. Bobo is a "competent member" of Respondent's family, or whether she is "of suitable age and discretion" and residing at Respondent's mailing address. The record also does not show whether Ms. Bobo had any implicit or explicit authorization to receive mail on behalf of Respondent, and there is no information from which to infer such authorization. Therefore, none of Complainant's suggested criteria for evaluating service are met. More importantly, the record does not show that the representative capacity contemplated by Rule 22.5(b)(1)(i) is met.

Complainant also raises a policy argument that, in effect, the certified mail alternative is a "somewhat relaxed" alternative to personal service, and that the intent of the rules would be undermined if properly addressed envelopes containing administrative complaints cannot be delivered to someone other than a respondent in order to perfect service. As discussed previously, the critical issue with respect to Complainant's motion is not whether service can be perfected by delivery to someone other than a respondent, but whether the individual who accepted delivery is "authorized to receive service on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i). While the authorization can be shown by the circumstances of a particular case, and need not be shown by an express authorization, due process requires that the procedure used

to effect service of the complaint is “reasonably calculated to achieve notice.” Katzen Bros., supra, at 1400. Such a showing has not been made in this proceeding.³ Regardless of whether Respondent actually received the complaint, the record contains no basis on which to infer that Ms. Bobo was authorized to receive the complaint on behalf of Respondent.

Conclusion

For the foregoing reasons, Complainant has not shown that service of the complaint in this matter complies with the service requirements of Rule 22.5(b)(1)(i). The motion for default order must be denied on this basis, and it is therefore unnecessary to consider the other matters raised in Complainant’s motion.

It is, therefore, ordered that Complainant’s motion for default order is denied.

Dated: October 24, 2001

_____/S/_____
Robert L. Patrick
Regional Judicial Officer, Region VII

³The showing may be somewhat more difficult in the case, as here, of an individual respondent, as opposed to a company where various employees may be presumed to be authorized to receive mail on behalf of their employer. If a complainant anticipates a problem in establishing whether the actual recipient has authority to receive a complaint on behalf of a respondent, one solution might be for the complainant to direct restricted delivery so that the document is delivered personally to the respondent. See, USPS guidance, p. 162 (Complainant’s Exhibit G.)